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NO. 771

In the Supreme Court of the United States

OCTOBER TERM, 1938

THE UNITED STATES OF AMERICA, *Appellant*

v.

ROCK ROYAL CO-OPERATIVE INC., ET AL., *Appellees*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR THE MILK CONTROL COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA AS AMICUS CURIAE

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SUMMARY OF ARGUMENT

Pennsylvania has a great stake in the outcome of the instant case: over 10,000 of its dairy farmers are suffering grievous financial losses in excess of $3,000,000 annually as a direct result of the decision below; and the great surplus problem of the New York market adversely affects the dairy industry of the entire Commonwealth.

Equalization of proceeds from the sale of milk is a means of alleviating the surplus problem. This, a fundamental action of the Secretary of Agriculture in Order No. 27, is beyond the jurisdiction of the State

in the multiple-state milkshed supplying New York City. Although Pennsylvania may prescribe minimum producers' prices for milk purchased within its borders and shipped to that market, the Commonwealth of Pennsylvania cannot equalize those prices by also regulating transactions in five other states; this is a field wherein the Federal authority alone can act.

Great national and (indirectly) domestic purposes are to be accomplished by Order No. 27 throughout the New York milkshed, and in each of the states serving that great metropolis. Strained interpretation of words, and failure to recognize natural factors inherent in a competitive industry, should not be permitted to defeat these great purposes.

ARGUMENT

1. Interest of the Commonwealth of Pennsylvania

The Commonwealth of Pennsylvania is directly affected by the instant case. In the first place, many Pennsylvania inhabitants and a great portion of the milk industry of Pennsylvania are included in the New York milkshed. In the second place, such portion of the dairy industry of the Commonwealth does in turn directly affect the remainder of its dairy industry, and indirectly the entire agricultural welfare of the Commonwealth.

The court below has found (R. 755) that 60,220 milk producers supply the New York milk marketing area; that these producers are situate in the States of New York, Pennsylvania, New Jersey, Massachusetts, Connecticut and Vermont; that 506 receiving stations supply the New York market. The record also discloses (R. 3989) that at least 10,570 milk producers located in Pennsylvania supply the New York market through at least 68 plants or receiving stations; that during the year November, 1936, to October, 1937, these Pennsylvania producers supplied a total of 788,122,000 pounds of milk or milk equivalent to this market comprising 16.8% of the total shipments thereto.

The extent to which the New York market affects the dairy industry of Pennsylvania is readily realized by the fact that 26 of the 67 counties in Pennsylvania are in the New York supply area; that 31.2% of the

farms in these counties receive over 40% of their total income from dairying (R. 3989).

The diary industry supplies more income to Pennsylvania farmers than any other branch of agriculture. In 1934 over 47% of the entire income of all persons engaged in agriculture in Pennsylvania was derived from dairy products; Bulletin Almanac (1936) 124; appellant's brief, page 58, in ROHRER *v.* MILK CONTROL BOARD, 322 Pa. 257 (1936).

Thus, the Commonwealth of Pennsylvania has a real stake in the outcome of the instant case.

Before Order No. 27 became effective the prices paid to the Pennsylvania farmers whose supply was shipped to the New York market averaged about $1.30 per cwt. for milk of 3.5% in the 201-210 mile zone (August, 1938). In the last month for which said order was effective (January, 1939) prior to the invalidation thereof by the court below, the price averaged about $1.84. Thereafter the average dropped to $1.35. The situation is comparable to a reduction of wages in a paramount industry of the Commonwealth by 27%, since the amount received for milk is the wage of the Pennsylvania dairy farmer. The practical consequences of the decision of the court below will mean the bankrupting of an important segment of the dairy industry of Pennsylvania—not only of producers whose supply reaches New York, but of producers whose supply is sold entirely intrastate in markets affected by the New York price.

As a direct result of the opinion of the court below the Milk Control Commission of Pennsylvania was required to reduce from $2.60 to $1.85 the Class 1 price paid to thousands of milk producers in Pennsylvania (f. o. b., 3.5% butterfat content) shipping to the Scranton (Pennsylvania) Milk Marketing Area[1].

Other respects in which the outcome of the present case affects the dairy industry of Pennsylvania will be noted below.

2. The State has no authority to act herein

In MILK CONTROL BOARD *v.* EISENBERG FARM PRODUCTS, INC., 59 Sup. Ct. 528 (February 27, 1939) this Court held that the Commonwealth of Pennsylvania may enforce its Milk Control Law (Act of April 30, 1935, P. L. 96, as partially repealed and reenacted by

[1]The Milk Control Commission of the Commonwealth of Pennsylvania, upon March 8, 1939, promulgated Official General Order A-37 reducing minimum prices in the Scranton Milk Marketing Area. In the "Findings of Fact and Reasons" filed with said order the Commission made, inter alia, the following determinations:

"Testimony of the main dealer witness also pointed out that by trade custom a direct relation exists between the price of milk shipped into the Scranton Market and the price of milk shipped into the New York City Market, (N. T. 28). Virtually the same production area supplies both markets (N. T. 30, 77). It was testified that increased production in the New York Area, and the recent court decisions invalidating Federal Order No. 27, would cause a lower price on the New York Market (N. T. 30). * * *

"Although some producers objected to a reduction in price (N. T. 75), claiming that they were producing milk at a loss (N. T. 86), their testimony did not contradict that above quoted with respect to the basic economic conditions surrounding the dairy industry in the Scranton Area. Furthermore, the manner in which conditions surrounding the market in New York affect Scranton conditions, may be administratively noticed by this Commission. * * *"

the Act of April 28, 1937, P. L. 417), including the licensing, bonding and minimum producers' price requirements thereof, against certain milk dealers purchasing milk from producers within the Commonwealth for shipment and sale without. Said the court:

> * * * But in matters requiring diversity of treatment according to the special requirements of local conditions, the states remain free to act within their respective jurisdictions until Congress sees fit to act in the exercise of its over-riding authority. One of the commonest forms of state action is the exercise of the police power directed to the control of local conditions and exerted in the interest of the welfare of the state's citizens. * * *
>
> The purpose of the statute under review obviously is to reach a domestic situation in the interest of the welfare of the producers and consumers of milk in Pennsylvania. Its provisions with respect to license, bond, and regulation of prices to be paid to producers are appropriate means to the ends in view. The question is whether the prescription of prices to be paid producers in the effort to accomplish these ends constitutes a prohibited burden on interstate commerce, or an incidental burden which is permissible until superseded by Congressional enactment. That question can be answered only by weighing the nature of the respondent's activities, and the propriety of local regulation of them, as disclosed by the record.
>
> * * * These considerations we think justify the conclusion that the effect of the law on interstate commerce is incidental and not forbidden by the Constitution, in the absence of regulation by Congress.

The brief filed by the Commonwealth in MILK CONTROL BOARD *v.* EISENBERG FARM PRODUCTS, INC., pointed out (pp. 60-62) that the Agricultural Adjustment Act of 1937, (Act of June 3, 1937, Public No. 137, 75th Congress, 7 U. S. C. A. Sec. 601) has not authorized the Secretary to require licenses or bonds of milk dealers; and the statute only authorizes price regulation under certain conditions where price disparity tends to interfere with interstate commerce. The record in MILK CONTROL BOARD *v.* EISENBERG FARM PRODUCTS, INC., did not disclose whether such conditions existed, or whether any order in correction thereof had been promulgated by the Secretary pursuant to the discretion vested in him by Congress. Nor did it show whether the respondent therein, or any part of the milk purchased by it, was affected by or included within any order through which the Secretary may have exercised his authority. In fact, no such order existed at the commencement or at the conclusion of the proceedings[2]; and, in fact, the respondent corpora-

[2] The proceedings in MILK CONTROL BOARD *v.* EISENBERG FARM PRODUCTS, INC. had been instituted by the Commonwealth August 21, 1936, prior to enactment of the Agricultural Adjustment Act of 1937 (Act of June 3, 1937, Public No. 137, 75th Congress, 7 U. S. C. A. Sec. 601). The decision of the Supreme Court of Pennsylvania therein (332 Pa. 34) was rendered June 30, 1938, prior to the promulgation of Order No. 27 (effective September 1, 1938) by the United States Secretary of Agriculture, pursuant to the Act of Congress. The decision of this Court therein was rendered February 27, 1939, after said Order No. 27 had been declared invalid in the United States District Court in the instant case (Feb. 23, 1939), and subsequent to the date (Feb. 1, 1939) as of which said Order No. 27 was rescinded (upon March 14, 1939) by the Secretary.

Thus, as in the case of BALDWIN *v.* SEELIG, 294 U. S. 511 (1935) (See Agricultural Adjustment Act of 1933, 48 Stat. 31), this Court considered an authority exercised by the State in relation to a federal authority partially granted but not exercised. See also cases cited below, footnote 3.

tion denied that it was a milk dealer subject to federal or state regulation.

In the case at bar, however, it is clear that Order No. 27 directly affects and includes milk dealers, milk producers and milk which—**by reason of the exercise of federal authority in such order**—are not subject to certain price regulations of the Milk Control Commission of the Commonwealth of Pennsylvania under the Milk Control Law[3].

Order No. 27 does more than prescribe minimum prices to be paid to certain Pennsylvania milk producers: It provides for "equalization" of the proceeds of the sale of milk at the prescribed prices. This is **completely beyond State authority in a multiple-state milkshed such as that supplying metropolitan New York.** Hence if this type of regulation, **deemed the most effective for this milkshed,** is to be had at all the industry must look to federal authority for it. These assertions will be amplified in the remainder of this brief.

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[3] Both the State and the federal statute authorize and direct that the respective officials cooperate with each other to achieve uniformity in the formulation, administration and enforcement of Federal and State programs. See Milk Control Law of Pennsylvania, Act of April 28, 1937, P. L. 417, Section 311; see also Act of 1935, as amended June 3, 1937, c. 296, Sec. 1, 50 Stat. 246 (7 U. S. C. A. Sec. 610). Where there is such intention to cooperate with rather than to supersede state authorities, state regulation is not superseded in absence of actual conflict: HARTFORD ACCIDENT & INDEMNITY CO. *v.* ILLINOIS, 298 U. S. 155 (1936); MERCHANTS' EXCHANGE *v.* MISSOURI, 248 U. S. 365 (1919); H. P. WELCH CO. *v.* NEW HAMPSHIRE, 59 Sup. Ct. 438 (1939). See also formal opinion of the Attorney General of Pennsylvania, No. 277, (March 13, 1939) to Howard G. Eisaman, Chairman of the Milk Control Commission.

Recent studies[4], and the record in the present case, disclose that the New York City milk market differs from every other market to which Pennsylvania producers' milk is shipped, in the enormous amount of "surplus" which that market must bear during certain periods of the year.

The "desirability of compelling an equal sharing of the burden of the surplus milk by all producers and distributors" is noted in the opinion below (R. 769) without refutation.

In studying the Pennsylvania surplus problem, the Pennsylvania State College survey[5] drew the following conclusions (at p. 67):

> The division of the surplus burden among the unorganized producers in the fluid industry was very uneven. Some producers had 90 per cent or more of their milk used for fluid purposes, while others had less than 10 per cent so used. The cooperatives have largely eliminated such inequalities among their members.

This was later emphasized (at p. 81) as follows:

> * * * There was, however, an unequal distribution of the fluid market among the farmers in the state. Some farmers sold practically all of their milk at fluid prices, while others in the same community supplied a

[4] Pennsylvania State College, SUPPLY AND UTILIZATION OF MILK IN PENNSYLVANIA (1936), Bulletin 327; Farm Credit Administration, SURPLUS PROBLEMS IN THE NORTHEASTERN MILKSHEDS (1938), Bulletin 24.

[5] See footnote 4, supra.

> manufacturing market. Approximately one-fourth of the producers who sold milk did not participate in a fluid market. This condition may lead to a more general use of market-wide pools.

From the same source it is learned that more milk is shipped out of Pennsylvania to New York than to any other extra-state market (Table 47, p. 78); that the seasonal variation in the utilization of milk shipped extra-state is greater than that of any intra-state non-manufacturing supply (Table 34, p. 56); that with respect to milk used for manufacturing the seasonal variation in volume used by dealers located in the Pennsylvania counties of the New York milk-shed differs 120% of the daily average for the year, as between the high month and the low month, whereas the State average is only 84% (Table 35, p. 58). Thus, it is apparent that Pennsylvania producers supplying New York contribute to the high seasonal surplus in the New York milkshed.

Under the circumstances, Pennsylvania milk producers and milk dealers should be participants in any plan to effectuate "equal sharing of the burden of the surplus" (R. 769) in the market which their supply reaches.

Especially is this true when it is realized that the great surplus of the New York milkshed **jeopardizes the intra-state market of Pennsylvania.** The Farm Credit Administration survey[6] determined (at p. 36):

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[6] See footnote 4, supra.

The facts presented in this section of the report show that wide differences exist as to the actual and relative amounts of surplus milk in the several milksheds of the northeast region. It is evident that the surplus problem is far more serious in the New York milkshed than in any of the others.

The effects of the large surplus in the New York milkshed have not been limited entirely to its own markets. In recent years a large proportion of the surplus milk in this area has been disposed of as cream, to manufacturers of ice cream and cream cheese, both within and without the milkshed, and to cream buyers in Boston, Philadelphia, and other outside markets (appendix, tables 41 and 42). At times the sale of this cream has had a depressing effect upon cream prices in those markets. Since nearly all the surplus milk produced in the other milksheds is utilized as cream, producers' returns have been affected to some extent by this situation.

The relation between the New York City surplus and the milk market of Scranton, Pennsylvania, has also been officially recognized by the Milk Control Commission of Pennsylvania[7].

Obviously, the availability of loose, cheap "distressed" milk supplies, induces unfair competition among all producers and dealers in the industry, to their detriment and to the obstruction of fair commerce, and to the jeopardy of the public health. Howard G. Eisaman, Chairman of the Milk Control Commission, has recommended to the General Assem-

[7] See footnote 1, supra.

bly of the Commonwealth now in session that express authority to equalize returns in intra-state markets be conferred upon the Commission; letter to House Committee on Dairy Industries, January 31, 1939. Thus, it is of immediate concern to the entire dairy industry of Pennsylvania that the surplus problem of the New York milkshed be solved.

Is any solution permissible by State action, under the Milk Control Law of Pennsylvania, or under similar statutes of the several states supplying New York City? This question compels an answer in the negative.

Equalization of surplus among persons in several states is clearly one of the subjects "of such a nature as to demand that, if regulated at all, their regulation must be prescribed by a single authority" (MILK CONTROL BOARD *v.* EISENBERG FARM PRODUCTS, INC., 59 Sup. Ct. at 530).

There is a vast distinction between prescribing a minimum price to be paid producers for milk acquired by a dealer **within** the State (MILK CONTROL BOARD *v.* EISENBERG FARM PRODUCTS, INC., supra) and requiring such price to be pooled with the proceeds of similar transactions between **producers and dealers in other states** (BALDWIN *v.* SEELIG, 294 U. S. 511). In the latter instance, "weighing the nature" of the activities of the persons beyond the jurisdiction of the State, and "the propriety of local regulation of them", (MILK CONTROL BOARD *v.* EISENBERG FARM PRODUCTS, INC., 59 Sup. Ct. at 531), one is forced to conclude that **Pennsylvania cannot and should not attempt to act**; that such "regu-

lation must be prescribed by a single authority" (supra).

3. The Federal authority should be sustained.

The Commonwealth is informed that other briefs filed in this cause deal fully with the legal aspects of Order No. 27, including the equalization feature thereof. However, because certain considerations of the court below directly affect all milk control regulation it is deemed necessary and desirable to comment here upon one salient feature of the case.

The court below held, inter alia, that since cooperative associations could continue to deduct certain operating expenses prior to making returns to their producer members, and since certain handlers, including such associations, were able to sell milk outside the marketing area, Order No. 27 was confiscatory in its application to the defendants. This conclusion was reached notwithstanding the express finding that these competitive conditions "had long existed" prior to the Act of Congress and the order promulgated thereunder. The court swept aside the principle of HEGEMAN FARMS CORPORATION *v.* BALDWIN, 293 U. S. 163 (1935) with the following declaration:

> This is more like a case of statutory disarming of one set of competitors and sending into competitive battle with another set to whom the same statute supplies arms.

It is submitted that the court below somewhat confused the "arms" and the shield in the competitive battle.

Merely because the injuries inflicted through some malpractices obstructing interstate commerce, and jeopardizing producers and handlers, can be minimized or prevented by the shield of a statute or order issued thereunder, is no reason for invalidating an order which either cannot or does not remove all other competitive differences.

No law or administrative order ever operated alike on all persons affected thereby, because few persons do business in an identical manner. The court below, in failing to recognize this simple truth, holds unconstitutional any regulation which marks certain lanes of fairness or reasonableness for all to follow in the economic race, merely because it does not also give courage to the fair and unfair who are weak, or deprive the tall of the advantage of their stride.

Thus, some handlers resell in distant markets—and all have the same opportunity to seek such markets, although smaller handlers or timid ones may find it more profitable to seek business at home than abroad.

Similarly, merely because certain cooperative associations are permitted to deduct certain operating expenditures before making returns to producer members, is no reason for the "discrimination" asserted in the opinion below. The Federal Trade Commission "Summary Report on Conditions with Respect to the Sale and Distribution of Milk and Dairy Products," filed January 4, 1937, in response to House Con. Resolution 32, 73d Congress, 2d Session—approved June 15, 1934, included the following final conclusions and recommendations:

> Where adequate and satisfactory markets are not otherwise available, it is recommended that cooperative marketing associations be prepared to make arrangements to lease or acquire and operate such plants and equipment as may be necessary to process and handle all milk produced by members that can not be satisfactorily disposed of otherwise.
>
> It is recommended that cooperative organizations be operated on a nonprofit basis, and that all receipts, after deducting only necessary expenses, and making provisions for reasonable operating reserves, be returned to producer-members in the nature of an equalized price for all milk handled.

Order No. 27 does no more than continue to permit this practice, engaged in long before its promulgation. Milk price regulation is not—and could not be—designed to make all handlers alike.

CONCLUSION

Neither the principle of, nor the need for, equalization has been attacked by the court below. This, a fundamental action of the Secretary in Order No. 27, is beyond the jurisdiction of the State in the multiple-state milkshed supplying New York City. Although Pennsylvania may prescribe minimum producers' prices for milk purchased within its borders and shipped to that market, the Commonwealth of Pennsylvania cannot equalize those prices by regulating transactions in five other states; this is a field wherein the federal authority alone can act.

Great national and (indirectly) domestic purposes are to be accomplished by Order No. 27 throughout the New York milkshed, and in each of the states serving that great metropolis. Strained interpretation of words, and failure to recognize natural factors inherent in a competitive industry, should not be permitted to defeat these great purposes.

Respectfully submitted,

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UNITE

BOCK ROYAL

MOTION FOR LE
AND BRIEF,
GUERNSEY
JOHN R. Mac
OTHER MEM